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Analysis

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The Referendum on Scottish Independence: A Process as well as an Event¹

With the referendum on independence barely six months away (at the time of writing), inevitably attention is now focused upon major substantive issues such as currency relations between an independent Scotland and the UK, and the ease or difficulty with which an independent Scotland would achieve membership of the European Union. What is often overlooked is that the credibility of the outcome of the vote on 18 September 2014, whatever that might be, will depend greatly on the legitimacy of the referendum process itself. Indeed, given the heat which the debate is now generating and the concomitant prospect of an ill-tempered and potentially bitter referendum campaign, it is of the highest importance that the process of the referendum itself be fair and be seen to be so by both sides: it is imperative for the future of Scotland that the result is agreed *to*, even if it is not agreed *with*, by losers as well as winners.

The procedural rules for the referendum have already been put in place. It is fortunate, I believe, that the two main pieces of legislation which will govern the process were passed with fairly calm deliberation by the Scottish Parliament before the political temperature started to rise. The franchise rules are set out in the Scottish Independence Referendum (Franchise) Act (the “Franchise Act”), introduced into the Scottish Parliament on 11 March 2013, passed by the Parliament on 27 June 2013, receiving Royal Assent on 7 August 2013.² This Bill needed to pass through the Scottish Parliament quickly to facilitate the registration of voters, particularly new voters since the franchise for the referendum is extended to 16 and 17 year olds. The Scottish Independence Referendum Act (the “Referendum Act”) was introduced into the Parliament on 21 March 2013, passed on 14 November 2013, and received Royal Assent on 17 December 2013.³

1 The author is currently ESRC Senior Research Fellow under the Future of the UK and Scotland programme, see <http://www.futureukandscotland.ac.uk/>. This article is based upon an Evidence Briefing prepared for the ESRC, entitled “Towards a Fair and Democratic Process? Regulating the Referendum on Scottish Independence”.

2 Available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61076.aspx>.

3 Available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/60464.aspx>.

The legislation was preceded by the Edinburgh Agreement signed by the UK and Scottish Governments on 15 October 2012.⁴ This, and the associated “memorandum of agreement”, provided that the referendum should have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, governments and people; and deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect. This has been formalised by an Order in Council⁵ which devolves to the Scottish Parliament the competence to legislate for a referendum on independence which must be held before the end of 2014.⁶

This article will summarise some of the main points to emerge from the legislation: the franchise rules for the referendum, the question that will be asked, the role of the Electoral Commission, the referendum period, and the parameters for other important process issues, in particular the funding and expenditure rules.

A. FRANCHISE

The general franchise demarcation set out in the Franchise Act is uncontroversial. The franchise for the referendum is to be the same as for Scottish Parliament elections and local government elections,⁷ mirroring the franchise used in the Scottish devolution referendum in 1997. One consequence is that EU citizens who are resident in Scotland will be able to vote in the referendum.

One major difference from the 1997 franchise, however, is the extension of the vote to those aged 16 and 17.⁸ This is a radical departure: never before have people under the age of 18 been entitled to vote in a major British election or referendum.⁹ Another notable provision of the Franchise Act excludes convicted persons from voting in the referendum if they are detained in a penal institution.¹⁰ This exclusion will apply even if the current ban on prisoners voting is modified in relation to elections prior to the date of the referendum. This has been a controversial topic in the UK ever since the European Court of Human Rights ruled that the blanket ban on prisoner voting in UK elections violated Article 3 of Protocol 1 (“A3P1”) of the European Convention on Human Rights.¹¹ It would seem, however, that section 3 of the Franchise Act does not violate the Convention since A3P1 guarantees “the free expression of the opinion of the people in *the choice of the legislature*”,¹² which is generally taken to refer exclusively to parliamentary elections and to

4 Available at <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

5 Per the Scotland Act 1998 s 30.

6 The Scotland Act 1998 (Modification of Schedule 5) Order 2013, SSI 2013/242, para 3.

7 Referendum Act s 2.

8 S 2(1)(a).

9 The age of 18 as the threshold for UK elections is set out in the Representation of the People Act 1983 s 1(d).

10 Franchise Act s 3.

11 *Hirst v the United Kingdom (No 2)* [2005] ECHR 681.

12 Emphasis added.

exclude referendums.¹³ This view has been endorsed by Lord Glennie in the Outer House.¹⁴

B. THE QUESTION

The Referendum Act contains a raft of important provisions which, *inter alia*, frame the question to be put to voters. The question as originally proposed by the Scottish Government has been changed. The formulation set out in the White Paper *Your Scotland, Your Referendum*, published in January 2012, was: “Do you agree that Scotland should be an independent country?”. Following conclusion of the Edinburgh Agreement, the Scottish Government sent its proposed question for review to the Electoral Commission. The Commission took issue with the phrase “do you agree”, suggesting that it could lead people to vote yes and proposed a change to the question.¹⁵ This has been accepted by the Scottish Government and the new question is now contained in the legislation: “Should Scotland be an independent country?”.¹⁶

C. ELECTORAL COMMISSION

The Referendum Act also formalises a more general oversight role for the Electoral Commission. Among a number of statutory duties, the Commission is given the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum.¹⁷ This is likely to be a challenging role, particularly in explaining the referendum question. There is already a heated debate between the UK and Scottish Governments as to what “independence” will mean for Scotland. It is hard to see how the Electoral Commission can attempt to produce an objective account of a number of highly technical and fiercely contested issues, concerning not only international relations but also defence, economic relations, the question of a currency union, the disentanglement of the welfare state, national debt etc, particularly when so many features of the post-referendum landscape would be contingent upon negotiations between the two governments in the event of a majority yes vote. John McCormick, the Electoral Commissioner for Scotland, said that the Commission would “not seek to explain to voters what independence means” but would offer information “aimed at ensuring that all eligible electors are registered and know how to cast their vote.”¹⁸

13 See http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/Adviser_memo_on_Franchise_s3.pdf.

14 Moohan and others, *Petitioners* [2013] CSOH 199.

15 See http://www.electoralcommission.org.uk/__data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf.

16 Referendum Act s 1(2).

17 Ibid s 21.

18 Letter from the Electoral Commission to the Convenor of the Scottish Affairs Committee, June 2013, available at http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/REF_Electoral_Commission_on_duty_to_provide_info.pdf.

D. REFERENDUM PERIOD

The Referendum Act sets a regulated period of 16 weeks before the referendum within which the statutory regime of campaign regulation will take effect including, for example, limits on campaign expenditure.¹⁹ This has left a lengthy period within which the two main referendum campaigns are not subject to these detailed provisions. Another set of regulations introduce what is known as a “purdah” period, which is common in UK elections. Under the Political Parties, Elections and Referendums Act 2000 (“PPERA”) there is to be no promotional activity by government, local authorities or public bodies during the twenty eight day “relevant period” prior to an election poll.²⁰ This provision is largely replicated in the Referendum Act²¹ in relation to the Scottish Government and a wide range of other public bodies which must not engage in promotional activity in the four weeks prior to the referendum. The UK Government also committed to be bound by equivalent restrictions in the Edinburgh Agreement.²²

E. FUNDING AND SPENDING RULES

Efforts are made within the Referendum Act to ensure equality of arms between the two campaign groups. Each side in the campaign can apply to the Electoral Commission to be appointed as one of two “designated organisations”, and both the Yes Scotland and Better Together campaign groups have intimated their respective intentions to do so. One notable feature of the legislation is that there is to be no public funding for any designated organisation. This is a conscious departure from PERA which does offer public funding for referendums. The decision not to fund the 2014 referendum was a political one taken by the Scottish Government. It has not resulted in any significant disagreement, presumably because both campaigns expect to be amply funded by private donors.

The Edinburgh Agreement also covers funding and expenditure issues.²³ Building on this, the Referendum Act contains detailed provisions on a range of funding issues. A “Campaign Rules” provision creates a regulatory regime through which funding, spending and reporting will be administered.²⁴ A “Control of Donations” provision indicates which types of donations are allowed²⁵ and what constitutes a “permissible donor”.²⁶ Under these provisions an application must be made for this status. There are also reporting requirements which mean that reports on donations received will

19 Referendum Act sch 4 part 3.

20 S 125(4)(b).

21 S 10 and sch 4 para 25.

22 For comment on this by Deputy First Minister Nicola Sturgeon see Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 554 and 560.

23 Paras 24-29, available at <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

24 S 10 and sch 4.

25 Sch 4 part 5.

26 Sch 4 para 1(2).

require to be prepared every four weeks during the referendum period.²⁷ These rules will all be overseen by the Electoral Commission.

Within the Referendum Act there are four categories of actor entitled to spend money during the campaign period:²⁸ designated organisations (which can each spend up to £1,500,000); political parties as “permitted participants”; other “permitted participants” who may spend up to £150,000; and any other participants spending less than £10,000 who do not require to register as permitted participants.

Political parties as permitted participants have a spending limit of either £3,000,000 multiplied by their percentage share of the vote in the Scottish Parliament election of 2011, or £150,000, whichever is greater. By this formula the spending limits for political parties represented in the Scottish Parliament is as follows:

Scottish National Party: £1,344,000

Scottish Labour Party: £834,000

Scottish Conservative & Unionist Party: £396,000

Scottish Liberal Democrats: £201,000

Scottish Green Party: £150,000

The Referendum Act also defines “campaign expenses”. These include campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media relations, transport, rallies, public meetings or other events and extends to notional expenses such as use of/sum of property, services or facilities etc.²⁹ There are also detailed rules on reporting of expenditure.³⁰ The Electoral Commission has a power to issue guidance on the different kinds of expenses that qualify as campaign expenses.³¹

It seems that these rules will lead to a generally level playing field in terms of expenditure within the regulatory period. For example, the total spending limit for the two pro-independence parties (SNP and Greens) is almost equal to that for the three unionist parties (Labour, Conservative and Liberal Democrat). But given that these spending limits only apply in the sixteen weeks before the referendum, this does leave the possibility of spending differentials between the two campaigns before this period begins. It should be observed, however, that these rules reflect the spending limits recommended by the independent Electoral Commission.³²

Finally, the Referendum Act provides for civil sanctions³³ and criminal offences³⁴ in relation to various categories of electoral malpractice, and the Electoral Commission is given an important role in enforcing the former.

27 Sch 4 para 41.

28 Sch 4 para 18(1).

29 Sch 4 paras 9 and 10.

30 Sch 4 paras 20-24.

31 Sch 4 para 10.

32 See http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf.

33 Sch 6.

34 Sch 7.

F. CONCLUSION

The Referendum Act is an instrument which, in building upon the Edinburgh Agreement principles, should set the conditions for a fair, lawful and democratic referendum. A significant task for the Electoral Commission, and for academic and other observers in the run up to the referendum, particularly once the regulated period begins, will be to monitor how well the legislation in the Referendum Act and Franchise Act is implemented and how responsibly all of those engaged in referendum campaigning behave. Compliance with the letter and the spirit of the legislation will be essential if the voting public is to have the best chance to participate in the referendum in an informed way and if the process as a whole is to live up to the aspirations of the Edinburgh Agreement. There is an opportunity to make the 2014 referendum a model for citizen engagement around the world. In the end the quality of Scottish, and indeed British, democracy will be gauged not only by how each side reacts to the outcome, but by the process through which that outcome is reached.

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Whose Central Bank is it Anyway?

The question of how UK assets and liabilities would be divided between an independent Scotland and the rest of the UK (“rUK”) following a yes vote in September’s independence referendum is a highly sensitive and contentious issue, as one might expect in any separation or divorce proceedings. Following the recommendations of the Fiscal Commission Working Group,¹ the Scottish Government has promised that it would seek to retain sterling as the currency of an independent Scotland within a formal currency union with rUK, arguing in last year’s White Paper that, “the pound is Scotland’s currency just as much as it is the rest of the UK’s.”²

The Scottish Government has also promised that independence would not mean significant additional public expenditure replicating a number of public bodies and government institutions in Scotland that are currently the preserve of the UK Government. An independent Scotland and rUK would, it says, continue to share

1 Scottish Government, *Fiscal Commission Working Group – First Report – Macroeconomic Framework* (2013), available at <http://www.scotland.gov.uk/Publications/2013/02/301>.

2 Scottish Government, *Scotland’s Future: Your guide to an independent Scotland*, Scottish Government (2013) 7, available at <http://scotgov.publishingthefuture.info/publication/scotlands-future>.